IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
November 3, 2009 Session

JEFFREY WAYNE CANSLER v. KAREN LOUISE KIRK CANSLER

Appeal from the Chancery Court for Hamblen County
No. 2003-422 Thomas J. Wright, Judge

No. E2008-01125-COA-R3-CV - FILED FEBRUARY 1, 2010

Jeffrey Wayne Cansler ("Father") and Karen Louise Kirk Cansler ("Mother") were divorced in 2005. Since that time, the parties have continued to disagree about almost everything and have filed numerous petitions for contempt. In this appeal, Father claims the Trial Court erred when it: (1) denied his motion for relief from the judgment; (2) distributed the marital property; (3) entered two judgments *nunc pro tunc*, (4) offset two findings of civil contempt against Mother with two findings of civil contempt against Father; and (5) sentenced Mother to community service for two remaining counts of civil contempt that were not offset. We affirm the Trial Court except as to the six findings of civil contempt as we hold the alleged contempts were criminal rather than civil in nature. Those six findings of civil contempt are vacated and remanded for further proceedings consistent with this Opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part and Vacated in Part; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and JOHN W. MCCLARTY, J., joined.

David W. Blankenship, Kingsport, Tennessee, for the Appellant, Jeffrey Wayne Cansler.

Beth Boniface, Morristown, Tennessee, for the Appellee, Karen Louise Kirk Cansler.

OPINION

Background

In August of 2003, Father filed suit seeking a divorce from Mother following a fifteen year marriage. The parties have two minor children, a daughter who currently is 11 years old and a son who is 15 years old. As grounds for divorce, Father alleged that Mother was guilty of adultery. Alternatively, Father alleged that irreconcilable differences had arisen between the parties. Father sought to be designated the children's primary residential parent.

Mother answered the complaint and denied that she was guilty of adultery. Mother admitted, however, that irreconcilable differences had arisen between the parties. Mother filed a counterclaim alleging that it was Father who had committed adultery. Mother also sought to be designated the children's primary residential parent.

In August of 2004, the Trial Court entered a temporary parenting plan which designated Mother the primary residential parent and set forth Father's co-parenting time. Father was ordered to pay child support in the amount of $772.24 per month.

The trial was held on March 28, 2005, following which the Trial Court entered a detailed sixteen page memorandum opinion. Initially, the Trial Court concluded that both parties had proven grounds for divorce. Accordingly, the Trial Court declared the parties divorced pursuant to Tenn. Code Ann. § 36-4-129(b).[1] The Trial Court then discussed the statutory factors to be considered when making a determination as to whom should be designated the primary residential parent. After so doing, the Trial Court concluded that it was in the children's best interests for Mother to be designated the primary residential parent. Father was ordered to pay $630 per month in child support.

The parties had substantial assets which included both real estate and Father's business. After valuing all of the property, Father ultimately was awarded property valued

---

[1] Tenn. Code Ann. § 36-4-129(b) provides as follows:

> The court may, upon stipulation to or proof of any ground of divorce pursuant to § 36-4-101, grant a divorce to the party who was less at fault or, if either or both parties are entitled to a divorce or if a divorce is to be granted on the grounds of irreconcilable differences, declare the parties to be divorced, rather than awarding a divorce to either party alone.

by the Trial Court at $665,053.35, and Mother was awarded property valued by the Trial Court at $618,046.00.[2]

The memorandum opinion was signed by the Trial Court on July 14, 2005. It was filed by the court clerk and supposedly mailed to the parties that same day. For some unknown reason, a final judgment was not entered until March 6, 2006. By that time, Father already had filed several pleadings, including a petition to modify custody. Although the final judgment was filed on March 6, 2006, it was entered *nunc pro tunc* to August 15, 2005. In any event, this final judgment declared the parties divorced and incorporated the contents of the memorandum opinion. The Trial Court acknowledged in the final judgment that Father had filed a petition for modification of custody and a ruling on that petition was reserved pending further hearing.

On April 24, 2006, Father filed a motion for relief from the final judgment. According to Father:

> 1. On or about the 2nd of March, 2006, a draft copy of a judgment in this divorce case was [signed] by the [Trial Court].[3]
>
> 2. Prior to that time no judgment had been entered although counsel for [Father] had checked to see if any judgment had been entered. Neither [Father's] counsel, nor [Mother's] counsel, received any notice from the Clerk that the Court had actually entered a judgment in this matter.
>
> 3. The only judgment submitted to [Father's] counsel was a proposed judgment which was never signed.
>
> 4. In a hearing on this matter on other issues on April 18, 2006, this matter was called to the attention of the Court by [Father's] counsel and [Mother's] counsel advised the Court that

[2] Mother was awarded the marital residence which had been owned by Father prior to the marriage. The Trial Court determined that Father had $45,000 in equity prior to the marriage. Father was awarded a little more than 50% of the marital property to offset the $45,000 in separate property.

[3] Although the final judgment was signed by the Trial Court on March 2, 2006, it was not entered by the court clerk until March 6, 2006.

> he had not received a copy of the entry of a judgment from the Clerk.
>
> 5. The judgment only contained the signature of [Mother's] counsel and did not have the signature of [Father's] counsel upon it.
>
> 6. Had [Father] been advised of the entry of the judgment, [Father] would have advised his counsel to make and/or file a motion for a new trial and/or file a notice of appeal.
>
> 7. If the Court treats the subsequent motion filed by [Father] as a Motion pursuant to Rule 59 as a motion for new trial, then the judgment is not final. If, however, the Court does not treat it as a Motion for a new trial, then [Father] would move the Court, pursuant to Rule 60 of the Tennessee Rules of Civil Procedure to alter or amend the judgment to the extent that the entry date would become effective only upon the date that both parties actually received notice that the judgment had, in fact, been entered, that is on April 18, 2006.

As can be seen, Father claims that had he known the final judgment had been entered, he would have appealed certain aspects of that judgment. Unfortunately, Father does not state what aspect(s) of the final judgment he would have appealed. Since he already had filed a petition for modification by the time the final judgment was entered, it appears likely that one of the issues he would have appealed was the custody determination.

Father's petition to modify custody was heard on April 18, 2006. At the same time, various petitions for contempt also were heard. In July of 2006, the Trial Court filed a memorandum opinion and modified the custody arrangement by designating Father the primary residential parent. The Trial Court specifically found that there had been a material change in circumstances and that it was in the children's best interest for Father to be designated the primary residential parent. The Trial Court also found Mother in civil contempt on two counts. First, she had an overnight guest of the opposite sex while the children were present in the home. Second, Mother took the parties' son to Knoxville for non-emergency medical care without telling Father where they were. The Trial Court fined Mother $50. A judgment incorporating the findings in this particular memorandum opinion was entered on September 11, 2006.

The parties continued to file numerous petitions for contempt. The original trial judge eventually recused himself. Although no reason for the recusal was given, we suspect that it was caused by understandable frustration over the inability of the parties to even remotely get along and the filing of a continuos stream of petitions for contempt. After a new trial judge was assigned to this case, a further hearing on all pending motions was conducted on May 5th and 6th of 2008. Following that hearing, on May 19th a detailed order was entered by the Trial Court which contained, among other things, a good summary of the procedural history of this case, only some of which is set forth above. According to this order:

> This action came before the court for a trial on May 5 and 6, 2008 on numerous pending motions and petitions seeking findings of contempt and to alter the permanent parenting plan in this case. As an initial matter, counsel for [Father] raised the question of the finality of the original judgment of divorce, citing his Motion for Relief from Judgment filed April 24, 2006 and arguing that this Motion, filed pursuant to rules 59 and 60 Tenn. R. Civ. Pro., had never been disposed of. For the reasons set forth below [Father's] Motion for Relief from the Judgment is DENIED.
>
> 1. Factual background
>
> The Final Decree of Divorce was filed in this case March 6, 2006. It was accompanied by a sixteen page Memorandum Opinion from the Chancellor which had previously been filed July 14, 2005. The Permanent Parenting Plan Order from the divorce trial was filed July 15, 2005.
>
> [Father] filed a Petition to Modify Permanent Parenting Plan/For Change of Custody on or about October 20, 2005. The pleading is in the court file but it does not contain the Clerk and Master's "Filed" stamp. The attorney's Certificate of Service indicates that it was served by mail October 20, 2005. On December 1, 2005 [Mother] filed her Response to Petition to Modify Custody which included a Counter-Petition to Modify Custody.
>
> The Chancellor conducted a trial on the merits of the Petition and Counter-Petition to Modify the Permanent

Parenting Plan as well as a motion for contempt that had been filed by [Father]. That trial was held on April 18, 2006. Apparently, during this trial, counsel for [Father] realized the original Judgment had been signed and filed. He then filed the subject Motion for Relief from Judgment April 24, 2006.

The Chancellor filed his Memorandum Opinion relating to the April 18, 2006 trial, on July 13, 2006 and a new Permanent Parenting Plan Order was filed on July 17, 2006. [Mother] filed a Motion for New Trial and a Motion to Modify, Alter, Amend and Reconsider on September 8, 2006. Her motions related to the issues decided in the July Memorandum Opinion and Permanent Parenting Plan Order although a Judgment on the July rulings was not entered until September 11, 2006.

A hearing was held on [Mother's] motions November 16, 2006 and an Order denying those motions was filed by the Clerk and Master December 8, 2006. Although the Order makes no reference to [Father's] Motion for Relief from Judgment it indicates the Chancellor intended the Order to provide finality.

Several other motions and petitions were filed from April 2006 to March 2007. Another hearing was held March 29, 2007 and the Chancellor ordered the parties to submit to the court a listing of the petitions and issues which needed to be heard by the court and/or resolved at mediation. An order to this effect was entered July 12, 2007. [Father's] Motion Outlining Pending Matters . . . was filed July 2, 2007 and did not list the Motion for Relief from Judgment among the issues remaining to be resolved. . . .

Thereafter, [Father] filed additional motions for contempt against [Mother] and on January 2, 2008, filed another Motion Outlining Pending matters to be Resolved . . . . Again, [Father] did not mention his Motion for Relief from Judgment as a pending issue in this pleading; although he did list the following as an issue to be decided:

> 6. A determination by the Court as to the issue of whether the parties are divorced; and if [Mother] is in contempt for remarrying and if she is in a bigamous relationship. . . .
>
> The Chancellor recused himself from further hearing this case by order filed February 18, 2008. The undersigned was designated to act as judge in this case . . . .
>
> 2. Conclusions of Law
>
> A detailed review of the Court's two volume file does not reveal a ruling by the Chancellor in writing regarding [Father's] Motion for Relief from Judgment. However, it appears clear that the Chancellor intended his original judgment of divorce and his subsequent modified Permanent Parenting Plan Order to be final orders. By implication, the Motion for relief from Judgment of [Father] had been denied at least by December 8, 2006 when the Chancellor specifically denied [Mother's] motions and clearly attempted to provide finality in this proceeding.
>
> Further, the Chancellor held numerous hearings in this matter and apparently [Father] never pursued his Motion for Relief from Judgment nor listed it in his two Motions Outlining Pending Matters, etc. Accordingly, it also appears that [Father] waived, abandoned, or failed to prosecute that motion such that it should be denied.[4] (footnote added)

Finally, the Trial Court ruled that Father's motion for relief from the judgment was too late to be considered under Tenn. R. Civ. P. 59. The Trial Court then determined that there was no "clerical mistake" as alleged by Father and, therefore, to the extent the Motion should be considered under Tenn. R. Civ. P. 60, Father had failed to establish an appropriate basis for relief.

The last order in this case, at least as to the record now before us, was entered on February 20, 2009. This order also addressed matters litigated at the May 2008 hearing

[4] This May 19, 2008, order was entered *nunc pro tunc* to December 8, 2006, an issue discussed later in this Opinion.

but which were not ruled upon in the May 19, 2008, order. In this last and final order, the Trial Court adopted its oral rulings that were made following the hearing as it pertained to various outstanding matters, including the numerous petitions for contempt. As pertinent to this appeal, the Trial Court found Mother in contempt on two counts for having an overnight visitor of the opposite sex in front of the children. The overnight visitor was Mr. William Timothy Pruitt, to whom Mother was not married.[5] Mother also was found in contempt of court for violating the parenting plan by allowing the children to be exposed to firearms. The Trial Court found a fourth act of contempt by Mother had occurred when she violated the parenting plan by not allowing Father to pick up the parties' daughter when a relative was visiting.

The Trial Court also found Father in contempt on two counts. First, the Trial Court found Father in contempt for failing to encourage a good relationship between Mother and the parties' son. Second, the Trial Court found Father in contempt for failing to adequately advise Mother when the children had doctor visits.

In summary, the Trial Court found Mother in contempt on four counts and Father in contempt on two counts. The Trial Court then ruled as follows:

> There were two items I found [Father] in contempt on, there were four I found [Mother] in contempt on. I'm going to offset the two on the two, which leaves [Mother] with the two contempts. I'm going to order that [Mother] perform three hours of community service for each of those two contempts for a [total] period of six hours.[6]

Father appeals raising several issues. First, Father claims that the Trial Court erred when it neglected to rule on his motion for relief from the judgment. Taking that one step further, Father claims that because the Trial Court did not rule on that motion, there is no final judgment of divorce and, therefore, Mother entered into a bigamous marriage when she later married Mr. Pruitt. Next, Father claims the Trial Court erred when it divided the marital property. Father then claims that the Trial Court improperly applied the principles of *nunc pro tunc* when it entered two of the judgments in this case. Father also challenges the findings of contempt. Specifically, he claims that the Trial Court erred when it: (1) offset

[5] Mother has since married Mr. Pruitt. They were married on November 30, 2007.

[6] Father objected to Mother being sentenced to community service, arguing that the Trial Court's only options were a fine and/or jail time.

the findings of contempt; and (2) ordered Mother to serve her sentence on the remaining two counts of contempt by performing community service.

Discussion

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

We first will address Father's claim that the Trial Court erred because it neglected to rule on his motion for relief from the judgment. As noted previously, when this motion was filed Father did not indicate what part of the final judgment he would have appealed had he known of the entry of that judgment and filed a timely notice of appeal. After filing this particular motion, Father continued to file several more petitions and motions, including a petition to change the children's primary residential parent from Mother to Father, as well as numerous petitions for contempt. The Trial Court ultimately determined that Father had proven the existence of a material change in circumstance and that it was in the children's best interest for Father to be the primary residential parent. Thereafter, the Trial Court asked the parties to inform the court exactly what motions were still outstanding and needed to be addressed, and Father never informed the Trial Court that his motion for relief from the judgment was, according to Father, still outstanding.

Based on the foregoing, we agree with the Trial Court's ultimate ruling on this issue that Father's motion for relief from the judgment was implicitly rejected by the original trial judge. However, we conclude that this implicit rejection occurred when the Trial Court granted Father's petition seeking a change in custody. The judgment granting the petition for change in custody was filed on September 11, 2006. Prior to the entry of that judgment, the Trial Court had been made aware that Father was claiming his motion for relief from the judgment had not been ruled upon. Changing custody to Father likely would have been a large part of the relief Father would have asked for had he filed a timely appeal from the original judgment. It is apparent that the Trial Court believed it was disposing of the motion for relief from the judgment in its entirety when it changed custody, even though the motion for relief from the judgment never was expressly mentioned by the Trial Court.

We hold that Father's motion for relief from the judgment was implicitly denied with the entry of the September 11, 2006, judgment. Father's time to appeal the

denial of his motion for relief from the judgment began to run on that date. Accordingly, there was a ruling on Father's motion for relief from the judgment, there is a final judgment granting a divorce, and Mother's remarriage has not resulted in a bigamous relationship. In no event could we find that the Trial Court's ruling on Father's Tenn. R. Civ. P. 59 and/or 60 motion for relief from the judgment was an abuse of discretion. *See Whitworth v. Whitworth*, No. 2008-01521-COA-R3-CV, 2009 WL 2502002, at *4 (Tenn. Ct. App. Aug. 17, 2009), *no appl. perm. appeal filed* ("We review a trial court's denial of both a Rule 60 motion and a Rule 59 motion under an abuse of discretion standard.").

The next issue is Father's claim that the Trial Court erred when it distributed the marital property.[7] The marital property was distributed in the final judgment of divorce entered on March 6, 2006. Father admits in his motion for relief from the judgment that he did not file an appeal within thirty days of entry of that judgment. Father's attempt to get around the untimeliness of his appeal of this issue is closely tied to the success of his motion for relief from the judgment. We already have concluded that the motion for relief from the judgment was implicitly denied on September 11, 2006, when the Trial Court entered its judgment granting Father's petition to change custody. Father's motion for relief from the judgment sought additional time to file an appeal. Because that motion was denied and we have affirmed that denial, Father's motion requesting additional time to file an appeal did not extend the time Father had to appeal the property distribution. Assuming, without deciding, that the filing of Father's motion for relief from the judgment extended the time to file an appeal pursuant to Tenn. R. Civ. P. 59, then he had thirty days from the denial of that motion to file a timely appeal. The notice of appeal was filed well over a year after the denial of Father's motion for relief from the judgment. It necessarily follows that Father's appeal of the marital property distribution is untimely and we, therefore, affirm the Trial Court's marital property distribution.

Father challenges the entry of two orders that were entered *nunc pro tunc*. The first order is the March 6, 2006, final judgment that was entered *nunc pro tunc* to August 15, 2005. Regardless of whether that judgment is deemed to have been entered on August 15, 2005, or March 6, 2006, Father still did not file a timely notice of appeal from that judgment. Thus, even if the Trial Court erred by entering the order *nunc pro tunc*, Father has failed to demonstrate that he was harmed or otherwise prejudiced in any way by this error.

---

[7] Mother claims Father's argument with respect to the marital property distribution is waived because he never has actually asserted in writing that he took issue with the property distribution. As we already explained, Father's motion for relief from the judgment never mentions the marital property distribution. In addition, Father has not directed this Court to any pleading specifically putting the Trial Court's marital property distribution at issue. In light of our conclusion that this issue is untimely, we need not consider whether it also was waived.

The second judgment entered *nunc pro tunc* that is challenged by Father is the May 19, 2008, order where the Trial Court determined, among other things, that Father's motion for relief from the judgment was without merit. This order was entered on May 19, 2008, *nunc pro tunc* to December 8, 2006. We already have discussed in detail the propriety of the May 19, 2008, order and affirmed the ruling of the Trial Court. While Father complains about the order being entered *nunc pro tunc*, he fails to demonstrate that he was prejudiced in any way or otherwise harmed by the order being entered in this manner. Nothing in this Opinion would change regardless of whether the May 19, 2008, order was entered *nunc pro tunc*.

Father has not demonstrated any harm or prejudice from either of the orders at issue being entered *nunc pro tunc*. Because the entry of these orders *nunc pro tunc* does not affect any of the substantive issues on appeal, we decline to enter an advisory opinion on whether these orders could or should have been entered *nunc pro tunc* and decline to discuss them any further.

The final issues surround the Trial Court's decision to offset four of the findings of civil contempt and to require Mother to perform a total of six hours of community service as her sentence for the two remaining counts of contempt. It is necessary that we begin with a discussion of the distinction between the two types of contempt, *i.e.*, civil and criminal. In *Overnite Transp. Co. v. Teamsters Local Union No. 480*, 172 S.W.3d 507 (Tenn. 2005), our Supreme Court stated:

> Criminal contempt is used to "preserve the power and vindicate the dignity and authority of the law" as well as to preserve the court "as an organ of society." *Black v. Blount*, 938 S.W.2d 394, 398 (Tenn. 1996). Generally, sanctions for criminal contempt are designed to punish the contemnor and are unconditional in nature. *Id.* One alleged to have committed acts of criminal contempt, other than those acts committed in the court's presence, must be given both notice of the alleged contempt and a hearing. Tenn. R. Crim. P. 42. If a defendant is charged with criminal contempt, guilt must be established by proof beyond a reasonable doubt. *Black*, 938 S.W.2d at 398. Criminal contempt cases are subject to the double jeopardy provisions in the federal and state constitutions. *See Ahern v. Ahern*, 15 S.W.3d 73, 80-82 (Tenn. 2000); *State v. Wood*, 91 S.W.3d 769, 773 (Tenn. Ct. App. 2002). Thus, an appeal from an acquittal of criminal contempt is barred.

> The present case, however, involves a civil contempt action that arose out of a civil proceeding. A civil contempt action is generally brought to enforce private rights. *See Robinson v. Air Draulics Eng'g Co.*, 214 Tenn. 30, 377 S.W.2d 908, 912 (1964). The safeguards afforded to one accused of criminal contempt are not available to one accused of civil contempt. Tennessee Rule of Appellate Procedure 3(a) governs the right to appeal a trial court's order declining to hold an alleged contemnor in civil contempt in a civil case. Rule 3(a) provides that "[i]n civil actions every final judgment entered by a trial court from which an appeal lies to the Supreme Court or Court of Appeals is appealable as of right." Rule 3(a) does not exclude civil contempt proceedings from an appeal as of right, and we can discern no reason to impose such restriction. . . .
>
> Overnite initiated civil contempt proceedings against the defendants and contended that the defendants willfully disobeyed the trial court's orders regulating the conduct of the parties during the strike. *See* Tenn. Code Ann. § 29-9-102(3) (1980 & 2000). One may violate a court's order by either refusing to perform an act mandated by the order or performing an act forbidden by the order. If the contemnor has refused to perform an act mandated by the court's order and the contemnor has the ability to comply with the order at the time of the contempt hearing, the court may fine or imprison the contemnor until the act is performed. Tenn. Code Ann. § 29-9-104 (1980 & 2000); *see Ahern*, 15 S.W.3d at 79. Thus, the contemnor possesses the "keys to the jail" and can purge the contempt through compliance with the court's order. *Id.*

Overnite, 172 S.W.3d at 510-511 (footnote omitted).

In *State v. Jones*, No. 01-A-09610-JV-0049, 1997 WL 181525 (Tenn. Ct. App. 1997), *no appl. perm. appeal filed*, the juvenile court found Sharon Massey[8] in civil contempt for failing to find a proper placement for a juvenile who was in state custody. Massey was ordered to serve eight hours of community service. *Id.* at *1. On appeal we reversed both the finding of civil contempt as well as the type of punishment imposed. We stated:

[8] Massey was the director of the Mid-Cumberland Community Health Agency Assessment and Care Coordination Team. *Id.* at *1.

> The punishment in this case was clearly for criminal contempt. The critical factor in the sentence is that the respondent must serve it regardless of whether she complies with the Court's order in the future. *See Robinson v. Gaines*, 725 S.W.2d 692 (Tenn. Crim. App. 1986). In other words, she does not hold the keys to the jail in her own pocket. *State ex rel. Anderson v. Daugherty*, 137 Tenn. 125, 191 S.W. 974 (1917).
>
> * * *
>
> We are also of the opinion that the sentence imposed exceeded the court's jurisdiction. In Tennessee the court's power to punish for contempt has been limited and defined by statute. *Black v. Blount*, 938 S.W.2d 394 (Tenn. 1996). Tenn. Code Ann. § 29-9-103 provides the following for the wilful disobedience of a court order (Tenn. Code Ann. § 29-9-102):
>
> > (a) The punishment for contempt may be by fine or by imprisonment, or both.
> >
> > (b) Where not otherwise specially provided, the circuit, chancery, and appellate courts are limited to a fine of fifty dollars ($50.00), and imprisonment not exceeding ten (10) days, and, except as provided in § 29-9-108, all other courts are limited to a fine of ten dollars ($10.00).
>
> The power to punish for contempt may be exercised only within the fixed rules of law. *Loy v. Loy*, 32 Tenn. App. 470, 222 S.W.2d 873 (Tenn. App. 1949). Public service is not one of the options a court may select in imposing punishment for criminal contempt. Thus, for this additional reason we reverse the judgment of contempt imposed by the juvenile court.
>
> The judgment of the lower court is reversed and the cause is remanded to the Juvenile Court of Sumner County for any further proceedings that may become necessary. . . .

Jones, 1997 WL 181525, at *1, 2. *Cf. Overnite Transp. Co. v. Teamsters Local Union No. 480*, 172 S.W.3d 507, 511 (Tenn. Ct. App. 2005) ("Fines for civil contempt [pursuant to

Tennessee Code Annotated § 29-9-105] may either coerce the contemnor to comply with the court order *or* serve to compensate the injured party.").

In the present case, the Trial Court did not expressly state whether the findings of contempt were civil or criminal. However, the Trial Court did state that its findings of contemptuous conduct were being made under the preponderance of the evidence standard, leading to the inescapable conclusion that the Trial Court believed its findings of contempt to be findings of civil contempt, not criminal contempt. *See Overnite*, 172 S.W.3d at 510 ("If a defendant is charged with criminal contempt, guilt must be established by proof beyond a reasonable doubt."). We, however, conclude that the Trial Court erred in this determination.

The Trial Court's findings of contempt would not have been affected by future compliance with its orders. The findings of contempt were based on conduct that was over and done with. In other words, any punishment was unconditional in nature and designed to punish the contemnor. Neither party possessed the proverbial "keys to the jail." As the alleged contempt was criminal rather than civil in nature, guilt was required to be established beyond a reasonable doubt rather than by the preponderance of the evidence standard applied by the Trial Court. Because the Trial Court should have proceeded as if the parties were seeking to have each other held in criminal contempt, all six findings of civil contempt contained in the February 20, 2009, judgment are vacated. We remand this case to the Trial Court for further proceedings, including a determination of whether there was sufficient proof to support a finding that the parties had engaged in conduct constituting criminal contempt.[9]

Because we are remanding this matter for further proceedings on the contempt allegations, it is necessary that we address the additional issues raised by Father concerning contempt. The next issue involves Father's claim that the Trial Court erred when it offset four of the findings of contempt by Father and Mother. Tenn. Code Ann. § 29-9-103 (2000) provides as follows:

---

[9] As stated previously, the Trial Court made six findings of civil contempt, four against Mother and two against Father. However, there were many other allegations of contemptuous conduct that were litigated at the May 2008 hearing. As to these other allegations, they were dismissed after the Trial Court found insufficient proof of contemptuous conduct. If there was insufficient proof of contemptuous conduct based on the civil preponderance of the evidence standard, then it necessarily follows that there was insufficient proof using the higher beyond a reasonable doubt standard applicable to criminal contempt proceedings. Thus, with regard to the allegations of contempt that were dismissed, these allegations must be deemed to have resulted in an acquittal that cannot be appealed and for which the parties cannot be placed in double jeopardy. In other words, the only findings at issue on remand will be the actions that resulted in the six findings of civil contempt. Of course, the Trial Court can consider any new allegations of contempt made after entry of the February 20, 2009, order, to the extent any such new allegations have been made.

> **Punishment.** – (a) The punishment for contempt may be by fine or by imprisonment, or both.
>
> (b) Where not otherwise specially provided, the circuit, chancery, and appellate courts are limited to a fine of fifty dollars ($50.00), and imprisonment not exceeding ten (10) days, and, except as provided in § 29-9-108, all other courts are limited to a fine of ten dollars ($10.00).

In *Thigpen v. Thigpen*, 874 S.W.2d 51, 54 (Tenn. Ct. App. 1993), we acknowledged the power of this Court to modify or suspend the sentence in a criminal contempt proceeding. We stated:

> We find that the evidence supports the trial court's conclusion that Ms. Thigpen violated its September 17, 1991 order beyond a reasonable doubt. Accordingly, we affirm Ms. Thigpen's conviction for criminal contempt. Appellate courts, however, may modify sentences for contempt on appeal when they appear to be excessive. *Barrowman v. State ex rel. Evans*, 214 Tenn. 408, 414, 381 S.W.2d 251, 253-54 (1964); *Robinson v. Air Draulics Eng'g Co.,* 214 Tenn. 30, 40, 377 S.W.2d 908, 913 (1964). In light of the facts of this case, we have determined that the trial court should have suspended all but one day of Ms. Thigpen's sentence.

If this Court can suspend a sentence for contempt where appropriate, then a trial court must necessarily have that same power.

Because Tenn. Code Ann. § 29-9-103 (2000) provides that a court "may" impose a fine or jail sentence, we conclude that the statute does not mandate that a person be fined or sentenced to jail once found in criminal contempt. Because the statute does not mandate that a sentence be imposed and because a trial court can suspend any sentence that is given, we conclude that the Trial Court has the power to offset findings of criminal contempt. This would have the exact same effect as simply suspending any sentence or not imposing any sentence for those findings of contempt where the offsetting is applied.

The final issue raised by Father is his claim that the Trial Court erred when it sentenced Mother to community service. We agree with Father on this issue. While the Trial Court has discretion on whether to impose a penalty, we conclude that if a penalty is imposed, a trial court is limited to the penalties set forth in the statute, i.e., a fine of fifty

dollars ($50.00) or imprisonment not exceeding ten (10) days, or both. *See State v. Jones*, No. 01-A-019610-JV-0049, 1997 WL 181525, at *2 (Tenn. Ct. App. 1997)("Public service is not one of the options a court may select in imposing punishment for criminal contempt.").

In light of the foregoing, we conclude that the Trial Court does have the power to offset findings of criminal contempt. We also conclude that the Trial Court's power to punish is limited to a fine and/or imprisonment as set forth in Tenn. Code Ann. § 29-9-103. On remand, if the Trial Court does find Mother in criminal contempt, the fact that she has already completed the community service sentence previously but improperly imposed is a factor the Trial Court may consider when determining any appropriate new sentence.

Conclusion

The judgment of the Trial Court is affirmed in part and vacated in part. This case is remanded to the Trial Court for further proceedings consistent with this Opinion and for collection of the costs below. Costs on appeal are taxed one-half to the Appellant, Jeffrey Wayne Cansler, and his surety, and one-half to the Appellee, Karen Louise Kirk Cansler, for which execution may issue, if necessary.

_____

D. MICHAEL SWINEY, JUDGE